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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1229

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-67a) is reported at 503 F.2d 1250. The opinion and order of the Federal Communications Commission (Pet. App. 1b-51b) are reported at 46 F.C.C. 2d 413. The related opinion and order of the Commission in *Specialized Common Carrier Services* is reported at 29 F.C.C. 2d 870.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1c) was entered on September 11, 1974. A petition for rehearing was denied on October 30, 1974 (Pet. App. 1d). The petition for a writ of certiorari was filed, pursuant to an extension of time granted by Mr. Justice Brennan, on March 28, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission was required to give American Telephone and Telegraph Company an evidentiary hearing in either (a) a proceeding to determine the nature of AT&T's interconnection obligation under a prior order of the Commission or, (b) a rulemaking proceeding to determine whether new entry into private line communications is in the public interest and what means of local distribution should be provided to make new entry effective.

2. Whether AT&T was provided with sufficient notice during the rulemaking proceeding that the Commission might issue an order which would require AT&T to provide other carriers with the same interconnections for Foreign Exchange and Common Control Switching Arrangement Service which AT&T provides to its Long Lines Department.

3. Whether the Communications Act authorizes a carrier unilaterally to abrogate a contract for service which may be provided pursuant to a contract by filing a tariff which is inconsistent with the terms of the contract.

STATEMENT

Telephone companies in the United States provide two general types of communications service: public and private line. The former consists primarily of voice communication service from and to all points on an integrated national and international telephone network, available to the public generally. The public telephone system allows a subscriber to reach any other subscriber over a circuit established for the purpose of the call. Ordinary long distance toll service and wide area telephone service (WATS) are common forms of public telephone service.

Private line service, generally sold to large users of communication, provides such customers "with full-time private circuits for the transmission of communications between locations specified by the customer. The service operates to give the customer continuous communication without requiring the carrier to establish a new connection for each call or message" (Pet. App. 7a, n. 3). Such services are often utilized for data and other nonvoice traffic. Private line services range from simple point-to-point communication to more complex services, such as foreign exchange ("FX") and common control switching arrangement ("CCSA") which require interconnections through the telephone network.[1]

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[1] The Commission, in language adopted by the court of appeals (Pet. App. 10b, n. 5; 7a, n. 4), defines FX and CCSA as follows.

> "Foreign exchange (FX) is a private line service that is partially 'switched'. It allows a businessman located in

Until 1969, most interstate private line service was provided by AT&T.[2] Private line services were also provided by Western Union and a few small carriers, but the public was then "primarily dependent upon AT&T for the provision of communications services, including specialized services." *Specialized Common Carrier Services*, 29 F.C.C. 2d 870, 913, n. 36.

In 1969, the Commission authorized Microwave Communications, Inc. ("MCI") to provide point-to-point microwave services between Chicago and St. Louis. *Microwave Communications, Inc.*, 18 F.C.C. 2d 953. Since MCI proposed only to provide trans-

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one state to, in effect, maintain a local phone in another state. Under FX, for example, a businessman in Washington can be reached by telephone subscribers in New York City and can himself reach New York City telephone subscribers (through a local loop in Washington, a Washington-New York interexchange line, and a business line in the New York City exchange area). However, New York City telephone subscribers could not reach Washington subscribers other than the Washington businessman over FX private line service and the latter would have to maintain a separate telephone in order to tie into the Washington exchange area.

"A Common Control Switching Arrangement (CCSA) is a private line system for linking the various offices of a large company through large switches on a local telephone company's premises instead of through PBX switches on the customer's premises. The private line circuits furnished in CCSA are provided for the exclusive use of the CCSA customers. However, the switching machines are shared with other private line service customers."

[2] The term AT&T as used herein includes American Telephone and Telegraph Company and the Bell System affiliates.

mitter-to-transmitter service, it was necessary to interconnect MCI customers with MCI's microwave terminals through AT&T facilities. AT&T initially refused to interconnect, claiming that such interconnection would harm its system. However, the Commission found that AT&T had offered no evidence to support its claims. *Microwave Communications, Inc.*, 21 F.C.C. 2d 190, 193.

The decision to grant the initial MCI application led to an influx of applications to the Commission for authority to provide a variety of interstate private line services. The Commission received approximately forty applications concerning more than 1,700 microwave station licenses. Rather than initiating hearings as to each application, the Commission decided to conduct a rulemaking proceeding to explore the common policy issues presented by these applications. See *Specialized Common Carrier Services*, 24 F.C.C. 2d 318, 350-352. Interested parties were invited to comment on whether entry of additional competing carriers providing private line service would serve the public interest. They were also asked to discuss, with particular attention to technical issues, the appropriate means for local distribution of the proposed services. *Id.* at 327, 349.

After a lengthy proceeding, the Commission found that existing carriers have not provided private line service with the diversity and flexibility the public interest required. *Specialized Common Carrier Services*, 29 F.C.C. 2d 870, 907-909. It concluded that "a general policy in favor of the entry of new car-

riers in the specialized communications field would serve the public interest * * *." *Id.* at 920. The Commission also addressed the local distribution question and declared "that established carriers with exchange facilities should, upon request, permit interconnection or leased channel arrangements on reasonable terms and conditions to be negotiated with the new carriers, and also afford their customers the option of obtaining local distribution service under reasonable terms set forth in the tariff schedules of the local carrier." *Id.* at 940. The Commission added that "where a carrier has monopoly control over essential facilities, we will not condone any policy or practice whereby such carrier would discriminate in favor of an affiliated carrier or show favoritism among competitors." *Ibid.*

The National Association of Regulatory Utility Commissioners and the Washington Utilities and Transportation Commission sought review of the Commission's decision in the Court of Appeals for the Ninth Circuit. AT&T did not intervene in that case and did not file a review petition of its own. The Ninth Circuit unanimously affirmed the Commission's action on January 20, 1975. *National Association of Regulatory Utility Commissioners* v. *Federal Communications Commission and U.S.A.*, and *Washington Utilities and Transportation Commission* v. *Federal Communications Commission and U.S.A.*, Nos. 72-1198 and 71-2919.

In the summer of 1973, MCI advised the Commission that AT&T was refusing to interconnect with MCI for the provision of services which the AT&T Long Lines Department provides to its private line customers through interconnection with Bell System operating companies (Pet. App. 11a). AT&T advised the Commission that it had no intention of participating in a "through service" with MCI or any other private line carrier (Pet. App. 12a). By letter order dated October 4, 1973, the Commission Chairman stated that AT&T is obligated under the *Specialized Common Carrier Services* decision to provide "interconnection [of such exchange] facilities [as] required by [the specialized] carriers to terminate the services which such carriers have been duly authorized in the public interest to provide and to eliminate any favored treatment of an affiliated or other competing carrier (Pet. App. 13a).

MCI then requested further clarification because some AT&T affiliates had declined to provide some forms of interconnection. The Chief of the Common Carrier Bureau sent a letter to AT&T advising it that MCI is entitled to obtain interconnection to provide FX, CCSA and two other types of private line service (Pet. App. 14a). AT&T sought review by the full Commission, claiming that it is not required to provide those particular services under the order in the *Specialized Common Carrier Services* decision or the October 4 letter order. On December 13, 1973, the Commission initiated a proceeding to determine the lawfulness of AT&T's actions. *Bell System Tariff*

Offerings, 44 F.C.C. 2d 245 (A. 130).[3] AT&T was directed to address the question whether "the Commission has heretofore ordered the telephone companies * * * to provide interconnection with MCI" and, if so, "the scope of that order or rule or regulation with particular reference to interconnection for FX and CCSA services of MCI * * *" (A. 140).

AT&T subsequently requested the Commission to hold a trial type hearing. The Commission rejected that request because "[n]o specific factual allegations [had been] advanced in support of [AT&T's] intimation of dire consequences from interconnection as to indicate the presence of significant unresolved factual questions" (A. 860).

In the meantime AT&T filed tariffs with the Commission describing the facilities which AT&T will make available to other communications carriers and the rates for such services. These included services which AT&T had long provided to Western Union under "exchange of facilities" contracts which had been filed with the Commission. The tariff rate was substantially higher than the contract rate. The AT&T-Western Union contracts provided for termination on five years' notice, and AT&T had given notice in September 1973, of its intention to terminate the contracts. The Commission's order of December 13, 1973, also directed AT&T to show cause why it should not be ordered to cease and desist from

[3] "A." refers to the Appendix in the court of appeals.

altering the provisions of the exchange of facilities contracts with Western Union (A. 139).

On April 23, 1974, the Commission issued an order directing AT&T to furnish MCI and other specialized common carriers interconnection facilities "essential to the rendition of all of their presently or hereafter authorized interstate and foreign communications services" including interconnecting into a telephone company's local exchange facilities for the purpose of providing FX and CCSA service (Pet. App. 45b). The Commission also rejected tariffs filed by AT&T insofar as the tariffs "include interconnection facilities and services covered by the Bell-Western Union exchange of facilities contracts * * *" (Pet. App. 47b).[4] The Commission concluded that its prior orders did encompass interconnection for FX and CCSA services. The Commission stated that AT&T's interpretation would be inconsistent with the basic purposes and objectives of those orders because "our action was taken to insure that competition in the provision of interstate private line communications services would be on a full, fair, and nondiscriminatory basis and that the specialized common carriers would not be excluded from that market by reason of the monopoly control by Bell and other telephone companies over local distribution facilities" (Pet. App. 24b).

On petition for review, the court of appeals unanimously affirmed the Commission order of April 23,

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[4] The Commission reserved for a separate investigation the determination of the validity of other portions of the tariffs (Pet. App. 39b-40b).

1974 (Pet. App. 1a-67a). The court concluded that the "show cause" proceeding cannot be viewed as an independent proceeding which resulted in an initial decision to order AT&T to furnish interconnection services for FX and CCSA. The Commission had "created in AT&T a duty to provide the specialized carriers with FX and CCSA" in *Specialized Common Carrier Services* and accordingly the show cause proceeding was "a device for enforcing previously articulated responsibilities * * *" (Pet. App. 26a, 18a-26a).

The court of appeals also held that the Commission was entitled to impose interconnection obligations in the rulemaking proceeding. It rejected AT&T's argument that Section 201(a) of the Federal Communications Act, 48 Stat. 1070, 47 U.S.C. 201(a), requires an evidentiary hearing for all proceedings which result in an interconnection order (Pet. App. 28a-31a); it held that the notice of proposed rulemaking provided AT&T with adequate notice that interconnection might be required (Pet. App. 36a-39a); and it held that AT&T has not alleged factual issues which require an evidentiary hearing (Pet. App. 35a).

The court of appeals also affirmed the Commission's rejection of the tariff which purported to supersede Western Union's contractual rights. The court held that under the Communications Act carriers are not prohibited from ordering their business relations with other carriers by contract as well as by tariff, that the agreements between AT&T and

Western Union are permissible, and that nothing in the Communications Act authorizes one party unilaterally to abrogate contracts properly made (Pet. App. 53a-63a).

ARGUMENT

1. AT&T's contention that it was entitled to an evidentiary hearing in the proceeding which resulted in the order of April 23, 1974, to provide interconnections for FX and CCSA service reflects a misconception of the nature of that proceeding. The primary purpose of the proceeding was to determine whether the Commission had already required AT&T to provide interconnections for FX and CCSA services in the prior rule-making proceeding.[5] The Commission rejected AT&T's interpretation of the final order in the *Specialized Common Carrier Services* proceeding, and the court of appeals concluded that the Commission had correctly interpreted its own order.

The interpretation of an administrative rule or order presents a legal rather than a factual question. AT&T was provided with an adequate opportunity to brief and argue its contention that the prior order did not cover FX and CCSA services. When the interpretation question was resolved, no factual ques-

[5] The "show cause" order did state that the Commission would consider whether AT&T should be required to provide FX and CCSA interconnections if it concluded that the prior order did not cover such services. However, the Commission did not have to reach that question because it found such interconnections were required by the prior order.

tions remained for resolution. AT&T does not dispute that it had in fact refused to provide such interconnections to carriers offering competing private line services while requiring local Bell System operating companies to provide such interconnections for private line services offered by AT&T's own Long Lines Department.

To the extent that AT&T is contending that the Commission should not have proceeded by rulemaking in the earlier proceeding, its collateral attack upon the prior order is not well founded. This Court has often recognized that regulatory agencies must have the flexibility to act either by general rule or by adjudication. *National Labor Relations Board* v. *Bell Aerospace Co.*, 416 U.S. 267; *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194. The Commission, having spent several years adjudicating MCI's hotly contested application for Chicago-St. Louis private line service, and being faced with dozens of new applications by different firms, decided to proceed to rulemaking in determining whether to open AT&T's near monopoly in private line service to competition and in selecting the means of insuring that new competitors would obtain local distribution. That procedure was appropriate for the common policy questions which confronted the Commission and presented AT&T a fair opportunity "to dissuade the FCC from ordering FX and CCSA interconnection * * * and was afforded the opportunity to present its arguments against the proposed interconnection" (Pet. App. 36a, 21b-22b).

AT&T argues, nonetheless, that the Commission cannot adopt any rule requiring interconnection without conducting an evidentiary hearing because Section 201(a) guarantees an "opportunity for hearing" prior to interconnection. However, this Court's decisions in *United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224, and *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, make it clear that the statutory phrase "opportunity for hearing" does not necessarily mandate an evidentiary hearing. Petitioners cite no legislative history showing congressional intent to require such hearings under Section 201(a). And the prior Commission decision cited by petitioners (Pet. 21) does not bind the Commission to one form of proceeding, when administrative procedural flexibility is necessary to deal with new developments in a fast changing field. *National Labor Relations Board* v. *Bell Aerospace*, *supra*; and see *Phillips Petroleum Co.* v. *Federal Power Commission*, 475 F.2d 842 (C.A. 10), certiorari denied *sub nom. Chevron Oil Company* v. *Federal Power Commission*, 414 U.S. 1146.

Alternatively, AT&T contends that, even if evidentiary hearings are not required in all interconnection cases, general principles of administrative law require an evidentiary hearing to resolve disputed facts concerning the "threat to its operational capacity" from FX and CCSA interconnection (Pet. 20, 24-25). However, AT&T has never demonstrated that its newly-discovered concern that interconnection for FX and CCSA might harm the technical efficiency

of the switched network system has sufficient basis to warrant an evidentiary hearing. While AT&T was alleging that interconnection of outsiders with Bell system operating companies to enable them to provide FX and CCSA service might harm the operation and maintenance of AT&T's switched network, AT&T was interconnecting with various independent telephone companies for those very services (Pet. App. 27b). AT&T did not present any data indicating that such interconnections with different companies have produced any problems, even though it would possess any data which may exist. AT&T merely asserted that the independent telephone companies "are partners with the Bell companies, not competitors. Joint arrangements work satisfactorily among partners, but not among competitors" (A. 228, fn.). However, specialized carriers offering private line services have every incentive to avoid any action which would jeopardize the technical efficiency of the system on which they depend for local distribution.

AT&T's presentation, as the court of appeals recognized (Pet. App. 35a), was akin to that described in *American Airlines, Inc.* v. *Civil Aeronautics Board*, 359 F.2d 624 (C.A.D.C.), certiorari denied, 385 U.S. 843: "a broad conceptual demand for an adjudicatory-type proceeding," without any proffer of relevant proof or lines of cross-examination. *Id.* at 633. And it had these grave weaknesses, despite the fact that AT&T was in the best position to present specific proof, if any existed (Pet. App. 35a). Moreover, AT&T could ease its generalized anxiety

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over future harm by imposing, as the court noted, "reasonable conditions for their [specialized carriers'] use of AT&T's switched network" (Pet. App. 35a).[6] It is "the kind of issue where a month of experience will be worth a year of hearings." *American Airlines, Inc.* v. *Civil Aeronautics Board, supra*, 359 F. 2d at 633.[7] The court of appeals' judgment was entirely consistent with precedent and based on sound common sense.[8]

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[6] The Commission has recently accepted an agreement between AT&T and other carriers including MCI which includes provisions with respect to the mechanics of, and rates for, interconnection for FX and CCSA services. See *In The Matter of American Telephone and Telegraph Company*, FCC Docket No. 20099, FCC 75-450, released May 7, 1975.

[7] Since the initial MCI proceedings, which were evidentiary, took six years to complete, AT&T's present request for an evidentiary hearing "is at least consistent with, though we do not say it is attributable to, a desire for protracted delay." *American Airlines, Inc.* v. *Civil Aeronautics Board, supra*, 359 F.2d at 633.

Moreover, the Commission stated: "When and if a claim of possible damage to the telephone system in a particular case is presented to the Commission by Bell, properly supported by engineering statements or other data, we shall of course determine the question on the basis of the pleadings and evidence submitted" (Pet. App. 29b). AT&T has yet to make any such presentation.

[8] Contrary to petitioners' contention (Pet. 24), the court of appeals did not "decline to follow" *Appalachian Power Co.* v. *Environmental Protection Agency*, 477 F.2d 495 (C.A. 4), on this issue. And as indicated above, the court of appeals properly held that AT&T had not raised any relevant disputed issue of fact meriting an evidentiary hearing.

2. AT&T also contends that it was not afforded adequate notice in the rulemaking proceeding that interconnection for FX and CCSA might be required (Pet. 26-32). Although it is not entirely clear, AT&T appears to advance two distinct claims: That in the rulemaking itself, the Commission failed to give adequate notice that it would deal with FX and CCSA interconnection (Pet. 27); and that the Commission erred in the show cause proceeding in concluding that it had required FX and CCSA interconnection in the rulemaking (Pet. 28-32).

The court of appeals correctly rejected the first contention, concluding that the Notice of Proposed Rulemaking was sufficient to place AT&T on notice that the inquiry encompassed all private line service offerings, including FX and CCSA (Pet. App. 37a-39a). The court noted that the Notice contained a computation of AT&T private line revenues which might be subject to diversion, and that the computation obviously included AT&T revenue from FX and CCSA services (Pet. App. 38a). Moreover, the Notice stated that the Commission will not condone any practice whereby a carrier with monopoly control over essential facilities discriminates in favor of an affiliated carrier. As the court of appeals pointed out (Pet. App. 39a): "If this passage connotes nothing else, it indicates that the Commission intended the established carriers to provide to the specialized carriers the same services (at the same rates) as those provided to AT&T's affiliates" (Pet. App. 39a).

AT&T nonetheless claims it was misled with respect to the scope of the rulemaking proceeding because MCI "described its system as involving only 'point-to-point' private line service connecting its customers' premises and expressly stated that no 'switching between customers is involved'" (Pet. 27). However, a particular carrier's description of its present plans, though surely a matter of interest to the Commission, does not establish the scope of a rulemaking inquiry; the agency sets the terms. *Pacific Coast European Conference* v. *United States*, 350 F.2d 197, 205 (C.A. 9), certiorari denied, 382 U.S. 958.[9]

AT&T also asserts that various statements in other proceedings by Commission attorneys and by the court of appeals indicate that the final order in the rulemaking proceeding did not clearly cover FX and CCSA services (Pet. 28-32). This contention, though cloaked in the language of notice, in reality only restates the argument advanced earlier that the Commission erred in regarding the rulemaking as covering FX and CCSA services (see pp. 9-12, *supra*). And, as shown earlier, it is insubstantial in light of the Commission's careful examination of its prior

[9] AT&T also claims it was misled because the Commission expressly mentioned local loops and did not mention other forms of interconnection. In view of the broad language of the notice AT&T could not reasonably assume that the Commission would not authorize other carriers to provide all forms of private line services and require existing carriers to provide all necessary interconnections. Indeed, the notice's computations of possible revenue diversions from AT&T were based upon AT&T's total revenues from all private line services including FX and CCSA.

proceedings (Pet. App. 9b-25b) and the affirmance of that examination by the court of appeals (Pet. App. 17a-25a). In any event, the fragments which AT&T has culled from other proceedings do not support its claim. AT&T places great emphasis on statements in respondents' brief in *National Association of Regulatory Utility Commissioners* v. *Federal Communications Commission and U.S.A.*, and *Washington Utilities and Transportation Commission* v. *Federal Communications Commission and U.S.A.*, C.A. 9, Nos. 72-1198, 71-2919, decided January 20, 1975, which may seem to characterize the rulemaking order as having dealt only with interconnections through local loops (Pet. App. 1f). The statements were made in a case in which the petitioners did not raise any interconnection issue, and the court of appeals in the present case correctly held that any such characterization was "unintentional" (Pet. App. 19a, n. 12). The Commission's statement to the Second Circuit that it "could rule that it was never its intention to allow MCI to provide 'FX' or 'CCSA' service * * *" (Pet. 28) is nothing more than a restatement of the Commission's own formulation of the issues in the then pending show cause proceeding (see Pet. App. 5b) and was made in the context of a suggestion that review of the October 4 letter order be deferred until the Commission reexamined the question.

AT&T's reliance upon the Third Circuit's decision to vacate a district court order directing AT&T to furnish interconnections for FX and CCSA service

is also unpersuasive. The district court issued a preliminary injunction a few days after the Commission issued its "show cause" order of December 13, 1973. The court concluded: "In the *Specialized Common Carrier* decision in Docket 18920, the F.C.C. had before it for consideration the full range of private line services and it contemplated competition by the newly authorized carriers in the provision of *all* those services." *MCI Communications Corp.* v. *AT&T*, 369 F.Supp. 1004, 1014 (E.D. Pa.). The Third Circuit vacated the district court order on primary jurisdiction grounds. *MCI Communications Corp.* v. *AT&T*, 496 F.2d 214. It concluded that the district court should not have acted until the Commission interpreted its own order. The Third Circuit opinion in that case thus did not reject the district court's conclusion that *Specialized Common Carrier Services* "required AT&T to provide FX and CCSA to the specialized carriers" (Pet. App. 25a).

In sum, AT&T has not presented any substantial question with respect to the adequacy of the notice in the rulemaking proceeding or the correctness of the Commission's interpretation of its rulemaking order which warrants review by this Court.[10]

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[10] The petition also states that if certiorari is granted, AT&T may present two other questions: Whether the order is substantively invalid under *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86, and whether it is "impermissibly over-broad * * * in seeking to impose an undefined obligation with respect to unknown services which specialized carriers may hereafter offer" (Pet. 4, n. 4). These contentions are insubstantial. The public interest findings in *Specialized Common Carrier Services*

3. Contrary to AT&T's assertion, the decision below affirming the Commission's rejection of a tariff which purported to abrogate the AT&T-Western Union contract does not conflict with *Armour Packing Co.* v. *United States*, 209 U.S. 56, or *Cincinnati, N. O. & T.P.Ry.* v. *Chesapeake & O. Ry.*, 441 F.2d 483 (C.A. 4) (*"CNO"*). The court of appeals correctly determined that this case is more analagous to *United Gas Co.* v. *Mobile Gas Corp.*, 350 U.S. 332, and *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348.

In *Armour* the United States prosecuted a shipper for a criminal violation of the anti-rebate provision

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are fully consistent with *Federal Communications Commission* v. *RCA Communications, Inc.*, for the reasons stated in the Ninth Circuit opinion affirming that order and in the decision below.

The Third Circuit determined in the present case that the obligation to render interconnections for subsequently authorized services must be read in context as requiring AT&T to furnish those interconnection "elements of private line services which AT&T supplies to its affiliates and furnishes to customers through its Long Lines Department" (Pet. App. 46a). Such a requirement is not overbroad. Indeed, it is probably no broader than AT&T's statutory obligation to refrain from making "any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service" or giving "any undue or unreasonable preference or advantage to any particular person, class of persons, or locality * * *." Section 202(a) of the Communications Act, 47 U.S.C. 202(a). See also *American Trucking Ass'n* v. *A.T. & S.F.R. Co.*, 387 U.S. 397, 407, in which this Court stated: "The fact that the person tendering traffic is a competitor does not permit the railroad to discriminate against him or in his favor." Cf. *United States* v. *Terminal Railroad Ass'n of St. Louis*, 224 U.S. 383.

of the Interstate Commerce Act, alleging that the shipper had knowingly received transportation service for less than the published tariff rate. The shipper claimed it was entitled to the lower rate under a contract which was executed at the former tariff rate before the railroad published a higher tariff. This Court declared that the anti-rebate prohibition does not contain any "provision excepting special contracts from the operation of the law." 209 U.S. at 81. The Court also observed that the Interstate Commerce Act does not contain any provision for filing contracts with shippers and declared: "If the shipper sees fit to make a contract covering a definite period for a rate in force at the time he must be taken to have done so subject to the possible change of the published rate in the manner fixed by statute * * *." *Id.* at 82.

In *United Gas* and *Sierra* this Court held that the Federal Power Commission should have rejected tariffs which purported to supersede prior contracts. The Natural Gas Act and the Federal Power Act, at issue in those cases, permitted the establishment of rates either by contract or by tariff. The Court concluded that those statutes do not authorize the regulated company unilaterally to abrogate such a contract by filing a tariff specifying a different rate.

The Third Circuit concluded that the Communications Act also permitted AT&T to proceed either by contract or by tariff in leasing facilities to Western Union. Thus, the statutory scheme with respect to these particular rates is analogous to the statutory

scheme in the *United Gas* and *Sierra* cases. Unlike *Armour*, it does not involve a rate which must be set by tariff.

The *CNO* decision is entirely consistent with this dichotomy between rates which must be set by tariff and rates which may be set by contract in lieu of tariff. Although the Interstate Commerce Act permits railroads to enter into many inter-carrier arrangements by agreement, the Fourth Circuit concluded that the service in question was one which must be provided under a tariff. It stated that that service, the return of misrouted freight cars, is a "transportation service" within the meaning of Section 6(7) of the Interstate Commerce Act, 24 Stat. 380, 49 U.S.C. 6(7), and thus lawfully performable not under contract but under tariff. 441 F.2d at 487. That court did not hold that a railroad would be entitled to abrogate a permissible contractual arrangement by filing a non-mandatory tariff which is inconsistent with the contract terms.

AT&T does not claim that the Third Circuit erred in concluding that the lease of facilities to Western Union could lawfully be done by contract as well as by tariff.[11] Any other conclusion would necessarily mean that AT&T continuously violated the

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[11] The Communications Act plainly contemplates that carriers may make a wide variety of contracts with other carriers, including contracts touching on rates. Section 211(a) compels the filing with the Commission of all contracts by a carrier with another carrier and the AT&T-Western Union contracts were in fact filed with the Commission.

Communications Act from 1934 to 1973. AT&T furnished leased facilities to Western Union throughout that period even though it had no tariff on file covering such lease arrangements.

The *CNO* decision was also based upon an alternative holding that the validity of the tariff could not be challenged in that proceeding. The question had arisen in a suit by CNO to collect amounts due under the published tariff. The other railroads asserted that the tariff was invalid because it conflicted with a prior contract. The Fourth Circuit declared that a "tariff, so long as it is in effect, must be treated as though it has the force of law." 441 F.2d at 488. That court noted that the ICC had refused to suspend the tariff, and courts have no power to suspend a railroad tariff. It stated: "Instead of pursuing the administrative remedies which the Commission expressly reserved, the railroads opposing the tariff abandoned the Commission as a forum, ignored the tariff, and awaited the inevitable suit that the CNO was required by law to file for the collection of its tariff." *Id.* at 489.

That alternative holding is, of course, an application of the primary jurisdiction rule established in *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426. There is no primary jurisdiction question in this case. The validity of the AT&T tariff was challenged in the appropriate administrative forum. The question of the validity of the tariff arose in administrative proceedings in this case as it did in *United Gas* and *Sierra*. The court of appeals cor-

rectly concluded that the agency was required to reject the tariff because the Communications Act is comparable to the Natural Gas Act and the Federal Power Act in that it does not authorize unilateral abrogation of contracts which are permissible under the statutory scheme.[13]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[13] As noted earlier (see n. 6, *supra*), AT&T and the newly authorized carriers providing private line service have negotiated an agreement concerning rates for FX and CCSA service which has been accepted by the Commission.

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